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Makemies Tryal.

And in regard the *Interlocutory Conference* upon that Occasion, which continued for some time, has been misrepresented by sundry hands, and is a seasonable & suitable preliminary to the ensuing Tryal: It is judged expedient to publish as much thereof, as was very soon committed unto Writing, as followeth.

Lord Cornbury. *How dare you take upon you to Preach in my Government, without my Licence?*

Mr. Makemie. We have Liberty from an *Act of Parliament*, made the First Year of the Reign of King *William* and Queen *Mary*, which gave us Liberty, with which Law we have complied.

Ld. C. *None shall Preach in my Government without my Licence?*

F. M. If the *Law* for *Liberty*, my Lord, had directed us to any particular persons in Authority for Licence, we would readily have observed the same; but we cannot find any directions in said *Act of Parliament*, therefore could not take notice thereof.

Ld. C. *That Law does not extend to the American Plantations, but only to England.*

F. M. My Lord, I humbly conceive, it is not a *limited* nor *local* Act, and am well assured, it extends to other Plantations of the Queens Dominions, which is evident from *Certificates* from *Courts of Record* of *Virginia*, and *Maryland*, certifying we have complied with said Law.

Both *Certificates* were produced and read by Lord Cornbury, who was pleased to say, these *Certificates* extended not to *New-York*.

Ld. C. *I know it is local and limited, for I was at making thereof.*

F. M. Your Excellency might be at making thereof, but we are well assured, there is no such *limiting clause* therein, as is in *Local Acts*, and desire the Law may be produced to determine this point.

Ld. C. *Turning to Mr. Attorney, Mr. Bekely, who was present, ask'd him, Is it not so, Mr. Attorney?*

Mr. Attorney. *Yes, it is Local my Lord, and producing an Argument for it, further said, that all the Pænal Laws were Local, and limited, and did not extend to the Plantations, and the Act of Toleration being made to take off the edge of the Pænal Laws; therefore the Act of Toleration does not extend to any Plantations?*

F. M. I desire the Law may be produced; for I am morally
perswaded

perswaded, there is no *limitation* or *restriction* in the Law to *England, Wales, and Berwick on Tweed*; for it extends to sundry Plantations of the Queens Dominions, as *Barbadoes, Virginia, and Maryland*; which was evident from the Certificates produced, which we could not have obtained, if the Act of Parliament had not extended to the Plantations.

And Mr. *Makemie* further said, that he presumed *New-York* was a part of Her Majesties Dominions also; and that sundry Ministers on the East-end of *Long-Island*, had complied with said Law, and *qualified* themselves at Court, by complying with the directions of said Law, and have no *Licence* from your Lordship.

Ld. C. *Yes, New-York is of Her Majesties Dominions; but the Act of Toleration does not extend to the Plantations by its own intrinsick vertue, or any intention of the Legislators, but only by her Majesties Royal Instructions signified unto me, and that is from Her Prerogative and Clemency. And the Courts which have qualified those men, are in error, and I shall check them for it.*

F. M. If the Law extends to the Plantations any manner of way, whether by the Queens *Prerogative, Clemency*, or otherwise, our Certificates were a demonstration we had complied therewith.

Ld. C. *These Certificates only were for Virginia and Maryland; they did not extend to New-York.*

F. M. We presume my Lord, our Certificates do extend as far as the Law extends; for we are directed by the *Act of Parliament*, to qualifye our selves in the places where we live, which we have done; and the same law directs us to take *Certificates* of our *qualification*, which we have accordingly done; and these Certificates are not to Certify to such as behold us taking our Qualification, being performed in the face of the Country, at a publick Court; but our Certificates must be to satisfie others abroad in the World, who saw it not, nor heard any thing of it, otherwise it were needless. And that Law which obliges us to take a Certificate, must allow said Certificate to have a credit and reputation in Her *Majesties Dominions*, otherwise it is to no purpose.

Ld. C. *That act of Parliament was made against Strowling Preachers, and you are such, and shall not Preach in my Government.*

F. M. There is not one word, my Lord, mentioned in any part of the Law, against *Travelling* or *Strowling Preachers*, as Your Excellency is pleased to call them; and we are to judge
that

that to be the true end of the Law, which is specified in the *Preamble* thereof, which is for the *satisfaction* of *Scrupulous Consciences*, and *Uniting* the Subjects of *England*, in interest and affection. And it is well known my Lord, to all, that Quakers, who also have Liberty by this Law, have few or no *fixed Teachers*, but chiefly taught by such as *Travel*; and it is known to all such are sent forth by the *Yearly Meeting* at *London*, and *Travel* and *Teach* over the Plantations, and are not molested.

Ld. C. *I have troubled some of them, and will trouble them more.*

F. M. We hear my Lord, one of them was Prosecuted at *Jamaica*, but it was not for *Travelling* or *Teaching*, but for *particulars* in *Teaching*, for which he suffered.

Ld. C. *You shall not spread your Pernicious Doctrines here?*

F. M. As to our *Doctrines*, my Lord, we have our *Confession of Faith*, which is known to the Christian World, and I challenge all the Clergy of *York* to show us any false or pernicious Doctrines therein; Yea, with those exceptions specified in the Law, we are able to make it appear, they are in all *Doctrinal Articles* of Faith agreeable to the Established Doctrines of the Church of *England*.

Ld. C. *There is one thing wanting in your Certificates, and that is Signing the Articles of the Church of England.*

F. M. That is the Clerks omission, my Lord, for which we are no way accountable, by not being full and more particular; but if we had not complied with the whole Law, in all the parts thereof, we should not have had Certificates pursuant to said Act of Parliament. And Your Lordship may be assured, we have done nothing in complying with said Law, but what we are still ready to perform, if your Lordship require it, and that ten times over: And as to the *Articles* of *Religion*, I have a Copy in my Pocket, and am ready at all times to Sign, with those exceptions specified in the Law.

Ld. C. *You Preached in a Private House, not certified according to Act of Parliament.*

F. M. There were endeavours used for my Preaching in a more publick place, and (tho' without my knowledge) your Lordships permission was demanded for my Preaching in the *Dutch Church*; and being denied, we were under a necessity, of assembling for Publick Worship in a Private House, which we did, in as publick a manner as possible, with open doors: And we are directed to certify the same to the next Quarter Sessions,

Sessions, which cannot be done, until the Quarter Sessions come in course ; for the Law binds no man to impossibilities ; and if we do not certifie to the next Quarter Sessions, we shall be culpable, but not till then : For it is evident, my Lord, that this Act of Parliament was made, and passed the Royal Assent, *May 24th*. And it being some time before the Quarter Sessions came in course, and all Ministers in *England* continued to Preach, without one days cessation or forbearance ; and we hope the practice of *England*, should be a president for *America*.

Ld. C. *None shall Preach in my Government, without my Licence, as the Queen has signified to me, by her Royal Instructions.*

F. M. Whatever direction the Queens Instructions may be to Your Lordship, they can be no Rule or Law to us, nor any particular persons who never saw, and perhaps never shall see them : for Promulgation is the life of the Law.

Ld. C. *You must give Bond and Security for your good Behaviour, and also Bond and Security to Preach no more in my Government ?*

F. M. As to our Behaviour, tho' we have no way broke it, endeavouring always so to live, *as to keep a Conscience void of offence, towards God and Man* : Yet if his Lordship required it, we would give Security for our Behaviour ; but to give Bond and Security to Preach no more in Your Excellency's Government, if invited and desired by any people, we neither can, nor dare do.

Ld. C. *Then you must go to Goal ?*

F. M. We are neither ashamed, nor affraid of what we have done ; and we have complied, and are ready still to comply with the Act of Parliament, which we hope will protect us at last : And it will be unaccountable to *England*, to hear, that *Jews*, who openly blaspheme the Name of the Lord Jesus Christ, and disown the whole Christian Religion ; *Quakers* who disown the Fundamental Doctrines of the Church of *England*, and both Sacraments ; *Lutherans*, and all others, are tolerated in Your Lordships Government : and only we, who have complied, and are still ready to comply with the Act of Toleration, and are nearest to, and likest the Church of *England* of any Dissenters, should be hindered, and that only in the Government of *New-York*, and the *Jersies*. This will appear strange indeed.

Ld. C. *You must blame the Queen for that ?*

F. M. We do not, neither have we any reason to blame Her Majesty, for She molests none, neither countenances or encourages any who do ; and has given frequent assurances, and of late

late in Her Gracious Speech to Her Parliament, *That she would inviolably maintain the Toleration.*

While Lord Cornbury was writing Precepts for discharging us from the custody of Cardale, High Sheriff of *Queens County* in *Long-Island*, and another for our Commitment in *York*; Mr. *John Hampton* demanded a Licence of Lord Cornbury, but he absolutely denied it.

And before finishing of said Mittimus, for their Commitment, Mr. *Francis Makemie* moved, that it was highly necessary before their Commitment, the Law should be produced, to determine that point, whether it is local and limited, or not: And it is not to be doubted, but Mr. Attorney was soon able to produce the Law: And he further offered to pay Mr. Attorney for a Copy of that Paragraph, in which the limiting Clause is, if any. But every thing relating hereunto was declined and disregarded.

Ld. C. *You Sir, Know Law.*

F. M. I do not my Lord, pretend to know Law, but I pretend to know this particular Law, having had sundry disputes thereon. The Mittimus being finished, they were committed to the Custody of *Ebenezer Wilson*, High Sheriff of *York City* and County, and carried to his Dwelling-House, as the place of their Confinement; and after sundry demands, they had upon the 25th day, the following Copy of the Precept, for their Commitment.

Y*OU are hereby Required and Commanded to take into your Custody, the Bodies of Francis Makemie (Seal) and John Hampton, and them safely keep till further Orders; and for so doing, this shall be your Warrant. Given under my Hand and Seal, this 23d. day of January, 1706, 7.*

Cornbury.

To Ebenezer Wilson, Esqr. High-Sheriff of New-York.

A true Copy, Ebenezer Wilson.

There are sundry things observable in this Warrant of Commitment, which is not usual in Warrants granted in *England*.
1. That it is Granted and Signed by the Supream Authority, and not by any Sworn Officers, appointed and authorized by Law, for Commitment of Offenders: And the Supream Authority of *England*, have not put any such power into practice, without

without a Special Act of Parliament, impowring them so to do ; and that only upon necessity and emergent occasions. 2. Here is no mention of the Queens Name, or Authority, which must be acknowledged a novelty not easily understood. 3. There is not the least shadow of a crime, or suspicion of a crime alleaged, which is but a slender cause of Conmitment. 4. This Mittinus is erroneous in Conclusion, which should be, until they are delivered by due course of Law, and not until further Order, which is condemned by Law and Lawyers as insufficient.

And finding themselves Imprisoned, and put under an unlimited Confinement, they addressed Lord *Cornbury*, by the following Humble Petition, presented to his Lordship, by the Hands of *Ebenezer Wilson*, High Sheriff.

To His Excellency *Edward* Viscount *Cornbury*, Captain General, and Governour in Chief, of the Province of *New-York, New-Jerseys*, and all the Tracts of Land depending thereon in *America*, and Admiral of the same. The Humble Petition of *Francis Makemie*, and *John Hampton*.

Most Humbly Sheweth,

That whereas Your Excellency has been pleased to Commit us to Prison, by a Precept, wherein there is no crime alleaged; we Your Lordships most humble Petitioners and Prisoners, most humbly pray, we may be admitted to know our Crime. And Your Excellency's most humble Petitioners & Prisoners further pray, as we are Strangers on our Journey to New-England, above four hundred miles from our Habitations, we may be allowed a speedy Tryal, according to Law, which we humbly conceive, to be the undoubted right and priviledge of every English Subject. And Your Excellency's most humble Petitioners, and afflicted Prisoners, shall, as in duty bound always pray.

Francis Makemie.

John Hampton.

To which Petition, after sundry days, they received the following verbal answer, by the Sheriff who presented the former Petition. 1. *La. Cornbury* did admire they should Petition to know their Crime, he having so oft told them. 2. If they take the right way, they may have a Tryal. And tho' they signified
their

their desire, both to the Sheriff and Mr. Attorney, to know what that right way was; yet could learn nothing; therefore resolved to arm themselves with patience, until they could obtain a *Writ of Habeas Corpus* from the Honourable *Roger Mompesson Esqr.* Chief Justice, who lived in another Government, and could Sign no such Writ, until he came into the Government of *New-York*; & thereby to bring our selves to a Tryal, or discharged according to due course of Law. In the mean time, the *Quarter Sessions* for the City and County of *New-York*, coming in course; and being still absolute strangers to the Constitution of *New-York*; and being ready to manifest their readiness in complying with the Act of Toleration in all things: They address'd Lord *Cornbury* by the following Petition.

To His Excellency, *Edward* Viscount *Cornbury*, Captain General & Governour in Chief, of the Province of *New-York, New-Jerseys*, and all the Tracts of Land depending thereon in *America*, and Admiral of the same. The Humble Petition of *Francis Makemie*, and *John Hampton*.

Most Humbly Sheweth.

That whereas Your Lordship is pleased not to allow our Certificates from Courts of Record in Virginia and Maryland, to reach to Your Excellency's Government; Therefore we being Your Lordships Prisoners, must humbly pray we may be admitted in the Custody of the Sheriff, to apply our selves to the Quarter-Sessions, that we may there offer our selves to qualification, as the Law directs, which we are again ready to do; we being resolved to reside in Your Lordships Government: And we Your Excellency's most humble Petitioners, and afflicted Prisoners, as in duty bound, shall always pray.

And this being rejected, with severe threatnings against the Messengers, for presenting a Petition without signing; they resolve to trouble his Excellency with no more Petitions, and being called the Petition of *Francis Makemie*, and *John Hampton*, and writ by the hand of one of them, and not acquainted with that practice of Signing all Petitions; it was manifest it came from them, and no other person. Next we addressed our selves to the Quarter-Sessions then Sitting the 5th day of *February*, by the following Petition, to the same purpose.

To

Makemie's Tryal.

To the Worshipful Justices of the Peace, now Sitting in the Quarter-Sessions, for the City and County of *New-York*. The Humble Petition of *Francis Makemie*, and *John Hampton*.

Humbly Sheweth,

That whereas your Petitioners, are Protestant Ministers dissenting from the Church of England, who have Certificates from Courts of Record, of Virginia and Maryland; certifying, we have taken the Oaths, and performed all such qualifications, as are required in an Act of Toleration, made in the first year of the Reign of King William and Queen Mary, for liberty of their Majesties Protestant and Dissenting Subjects; which Certificates his Excellency Lord Cornbury is not pleased to allow of, to extend to his Government.

We therefore your Worships humble Petitioners pray, we may be admitted to appear in the Custody of the Sheriff, at the Bar of your Court, to qualify our selves again, according to the particular directions of said Act of Parliament, which in obedience to the Law, we are always ready to do: And your Worships humble Petitioners, as in duty bound, shall always pray.

Francis Makemie.
John Hampton.

This Petition being presented, was viewed and handed about, but never allowed a reading in open Court; and Mr. Attorney laying hold thereon, was putting it into his Pocket, asserting it to be a Libel against *Ld. Cornbury*, and told the Justices, it was none of their business to administer the Qualifications, or to this effect.

At the same time, a Certificate in writing was presented by two Inhabitants, for certifying the Dwelling-House of *William Jackson*, where Mr. *Makemie* had Preached, desiring the same to be put upon Record: And tho' the Court had these things under consideration for two days, and put the presenters of those Papers to the trouble of a second appearance, & to bring with them Law, for the Courts direction, all was rejected; tho' they had not long before Recorded a Quaker Meeting-House, certified by two men, to the same Court, upon the same Act of Parliament. But for the information of all; whatever offers are made to any proper Court for qualification, where the Act Toleration takes place, is a legal qualification in the eye of the Law, tho' the Courts reject, and take no notice thereof.

And

And at length, some days before *March Term*, soon after the arrival of the Chief Justice, *Roger Mompesson Esqr.* the Prisoners by their Lawyer, Mr. *Reigniere* presented to the Chief Justice, the following Petition, at his Chamber.

To the Honourable *Roger Mompesson Esq.* Chief Justice of this Her Majesties Province of *New-York*.

May it please your Honour,

WE the Subscribers being Prisoners detained in the Custody of the Sheriff of the City of *New-York*, by virtue of a Warrant, whereof a true Copy is hereunto annexed; Do most humbly request your Honour, to award and grant us Her Majesties Writ of Habeas Corpus, to be directed to the said Sheriff, that we may be thereby brought before your Honour, or some other Judge, in order to our Enlargement; according to Law. We are your Honours most humble Servants.

Francis Makemie.

John Hampton.

And after a due consideration of the Statutes in this case provided, the following Writ of *Habeas Corpus* was granted, and the Prisoners were not without hopes to be discharged without Bail, there being no crime nor suspicion of crime, specified in our Warrant of Commitment.

‘ **A** *NNE*, by the Grace of God, Queen of *England*,
 ‘ *Scotland*, *France* and *Ireland*, Defender of the
 ‘ Faith, &c. To the Sheriff of our City of *New-York*:
 ‘ Greeting. We Command you, that the Bodies of
 ‘ *Francis Makemie* and *John Hampton*, in our Prison,
 ‘ under your Custody detained, [as it is said] under safe
 ‘ and secure conduct, together with the day, and cause
 ‘ of their Caption and detention, by whatsoever names,
 ‘ the same *Francis* and *John*, may be reputed in the
 ‘ same, you have before our trusty and well-beloved
 ‘ *Roger Mompesson Esq.* our Chief Justice of our Supreme Court of Judicature of our Province of *New-York*, at his Chamber, Situate in *Queens-street*, in the
 ‘ City of *New-York*, immediately after the receiving of
 ‘ this Writ, to do, and receive all and singular those
 ‘ things which our said Chief Justice, of him, shall then
 ‘ and there consider in this behalf; and have you then
 ‘ and there this Writ. Witness *Roger Mompesson Esqr.*

our

Makemies Tryal.

‘ our Chief Justice at *New-York*, this eighth day of
 ‘ *March*, in the sixth Year of our Reign. *Clark*,
 ‘ *Octavo die Martij infra Script. Allo.*
per me, Roger Mompessen.

The Execution of this Writ appears in the Schedule here-
 unto annexed.

Ebenezer Wilson, Sheriff.

A true Copy. *George Clarke.*

This Writ being put into the Sheriffs Hands on *Saturday*, was not executed till *Monday*, in the Afternoon, at which time the Sheriff told them, he had another Mittimus put into his hands, wherein a supposed crime was specified, and only to be detained, until discharged by due course of Law; and so were obliged to provide Securities: And as our Confinement was by the former Mittimus, by a new Mittimus, our Imprisonment was implicitly adjudged and owned to be false Imprisonment for six weeks and four days; & the Sheriff in the presence of Dr. *John Johnstone*, Mr. *Regniere*, and Mr. *William Jackson*, refused to Execute the foresaid Writ, until they had paid him twelve pieces of Eight, for their Commitment, and as much more for the Return of the Writ of *Habeas Corpus*; denying also Receipts for said money when paid.

They were conducted the immediate day, before the Supream Court, and upon their *new Mittimus*, contained in the following Return, were obliged to enter *Recognizance*, with two Securities, Doctor *John Johnstone*, and Mr. *William Jackson*, for their appearance next day, at the Supream Court, and bound not to depart, without the Courts leave.

The Return is as followeth.

‘ **I** *Ebenezer Wilson* Esqr. Sheriff of the City and
 ‘ County aforesaid, to *Roger Mompessen* Esqr. Chief
 ‘ Justice of the Supream Court of Judicature, of the
 ‘ Province of *New-York*, at the time and place in the
 ‘ Writ to this Schedule annexed specified, do most
 ‘ humbly certifie, that before the coming of that Writ
 ‘ to me directed; the within named *Francis Makemie*
 ‘ and *John Hampton*, were committed unto the Goal
 ‘ and Prison of our Lady the Queen of the City of
 ‘ *New-York*, under my Custody, by virtue of a certain
 ‘ Warrant, under the Hand and Seal of *Edward Vis-*
 ‘ count *Cornbury*, Captain General, and Governour in
 Chief

‘ Chief of the Province of *New-York*; bearing date,
 ‘ the three and twentieth day of *January* last past; the
 ‘ tenour of which Warrant followeth in these words,
 ‘ *viz.* You are hereby required and commanded, to
 ‘ take into your Custody, the Bodies of *Francis Make-*
 ‘ *mie & John Hampton.* and them safely keep, till further
 ‘ Orders; and for so doing, this shall be your sufficient
 ‘ Warrant. Given under my Hand and Seal, this three
 ‘ and twentieth day of *January*, 1706, 7. *Cornbury.*
 ‘ To *Ebenezer Wilson* Esqr. High Sheriff of the City
 ‘ and County of *New-York.* And I do further Certifie,
 ‘ that before the coming of said Writ to me directed,
 ‘ that the said *Francis Makemie* and *John Hampton*,
 ‘ were committed afterwards by another Warrant, under
 ‘ the Hand and Seal of his said Excellency, *Edward*
 ‘ Viscount *Cornbury*, Governour aforesaid; bearing date
 ‘ the eighth day of *March* instant, unto the Goal & Pri-
 ‘ son aforesaid, under my Custody; the tenour of which
 ‘ Warrant also followeth in these words, (*viz.*) *New-York.*
 ‘ ss. You are hereby required & commanded to take into
 ‘ your Custody, the Bodies of *Francis Makemie & John*
 ‘ *Hampton*, pretended dissenting Protestant Ministers,
 ‘ for Preaching in this Province, without qualifying
 ‘ themselves according to an Act of Parliament, made
 ‘ at *Westminster*, in the first year of the Reign of our
 ‘ late Sovereign Lord and Lady, King *William*, and
 ‘ Queen *Mary*; and also without my Licence first
 ‘ obtained; and them safely to keep, till they shall be
 ‘ discharged, by due course of Law; and for so doing,
 ‘ this shall be your sufficient Warrant. Given under my
 ‘ Hand and Seal, this eighth day of *March*, *An. Dom.*
 ‘ 1706. *Cornbury.* To *Ebenezer Wilson* Esqr. High
 ‘ Sheriff of the City and County of *New-York.* And
 ‘ this is the cause of the taking and detaining the Bodies
 ‘ of the aforesaid *Francis Makemie*, and *John Hamp-*
 ‘ *ton*; yet the Bodies of them the said *Francis Make-*
 ‘ *mie*, and *John Hampton*, before the said *Roger Mom-*
 ‘ *pessen*, Esqr. Chief Justice as aforesaid, at the time
 ‘ and place in the Writ aforesaid, specified, I have
 ‘ ready, as it is in the said Writ commanded me.

A True Copy. *George Clarke.*

It is observable, the second Warrant is still granted, and signed by the Supream Authority, and without mentioning the
 Queens

Makemies Tryal.

Queens Name or Authority: And the supposed Crime specified is double; as 1. Preaching in *New-York* Government, without complying with the qualifications of an Act of Parliament, made the first year of King *William & Queen Mary*: Whereas *Ld. Cornbury* had read in *January*, their Certificates both from *Virginia* and *Maryland*, certifying their qualification according to said Act of Parliament. 2. Preaching without Licence being first obtained of *Lord Cornbury*; whereby it is plain, that complying with the Law, is not sufficient without a Licence: And from what goes before, it is undeniable, they were qualified, and had complied with the Law, even in *New-York* Government, before the date of this last Warrant, and that was by tendering themselves, not only to his Excellency, but also to the Quarter Sessions, for qualification; which is all that any Dissenter can do, and all the Law requires of them to be done: And such as had Licence, are not yet qualified according to said Act of Parliament. For taking the Oaths only before *Ld. Cornbury*, and taking them before a Court, are not the same. But having related all the antecedents to the Tryal, we are now arrived at the Tryal or Prosecution at the Supream Court in *March* Term.

Supream Court, *March* the first *Tuesday*, 1706, 7.

Province of }
New-York. }

Present *Roger Mompesson*, Esqr. Chief Justice.
Robert Millward } Esqrs. Justices.
Thomas Wenham. }

The Court being called formally, and the Docquet called over, *Francis Makemie*, and *John Hampton* made their appearance, and answered to their Names, according to the tenour of their Recognizance.

The Defendants Recognizance ordered to be filed, and the Defendants Appearance Entered.

At the Attorney Generals motion, it is ordered, that the Defendants be continued on their Recognizance, and that they attend the last day of the Term.

The Pannel of the Grand Jurors.

{	<i>William Merrit.</i>	<i>Elias Boudmot.</i>	}
	<i>William Anderson.</i>	<i>Nathaniel Mastin.</i>	
	<i>Robert Lurting.</i>	<i>Francis Vincent.</i>	
	<i>Lawrence Reed.</i>	<i>Lewis Carree.</i>	}

Daniel

{ *Daniel Cromline.* *Lancaster Symes.* }
 { *Richard Sacket.* *Adrian Hogland.* }

{ *Beverle Lathom.* *Charles Wooley.*
Johannis Hogland. *Peter Ryckman.* *Johannis Burger.*
Benjamin Winroop. *Paul Drolet.*
Abraham Jeanneau. *William Provoost.*
 A true Copy. *Geo. Clarke.*

Mr. *Reignere*, Attorney for the Defendant, moved, that the Writ of *Habeas Corpus*, with all proceedings thereon, at the Chief Justice his Chamber, might be Entered upon Record.

Mr. Attorney for the Queen, replied, it was not matter of Record being obtained not in open Court, but at the Chief Justice his Chamber, and returned to the same place, therefore was not matter of Record; so was put off for that time.

Wednesday the Second Day of the Term.

The Honourable, *Roger Mompesson*, Chief Justice, finding the Writ of *Habeas Corpus*, and former proceedings thereon, was matter of Record, gave in the following Memorandum to the Court to be Entered.

Supream Court.

New-York. ss.

Memorandum, That at the Supream Court of this Province, held at the City of *New-York*, the second *Tuesday* in *March*, in the Sixth Year of Her Majesties Reign; *Roger Mompesson* Esqr. Chief Justice of this Province, delivered unto the said Supream Court, a certain Record, the tenour whereof followeth in these words.

New-York. ss. To the Supream Court of the Province of *New-York*.

‘ **I** *Roger Mompesson*; Chief Justice of the said Court, do
 ‘ hereby Certifie, That upon the eighth day of *March* in-
 ‘ stant; That upon a Petition, Signed by *Francis Makemie*, and
 ‘ *John Hampton*, then delivered unto me: I granted and allow-
 ‘ ed the Writ of *Habeas Corpus* hereunto annexed; which being
 ‘ returned unto me, at my Chamber, in the said City of *New-*
 ‘ *York*, by *Ebenezer Wilson* Esqr. Sheriff of the said City &
 ‘ County of *New-York*, the tenth day of this instant Month of
 ‘ *March*, with the Bodies of the said *Francis Makemie*, and
 ‘ *John Hampton*, together with the Causes of their Commit-
 ‘ ment hereunto annexed; whereupon I did at the day and
 ‘ place last mentioned, discharge the said *Francis Makemie*,
 and

‘ and *John Hampton*, from their several Imprisonments, taking
 ‘ the several Recognizances hereunto annexed.

Roger Mompesson.

New-York. ss. **M**Emorandum, *On the 10th day of March, in the Sixth Year of the Reign of our Sovereign Lady ANNE, by the Grace of God, of England, Scotland, France and Ireland, Queen, Defender of the Faith, &c. Came before me, Roger Mompesson Esqr. Chief Justice of New-York, Francis Makemie of &c. John Johnstone, of the Province of New-Jersey, Gent. and William Jackson, of the City of New-York, Cordwainer, and acknowledged themselves severally to be Indebted to Our Sovereign Lady the Queen, as follows, viz. the said Francis Makemie, in the Sum of Forty Pounds, Currant Money of this Province; and the said John Johnstone & William Jackson, in Twenty Pounds like Money each, to be levied on their Goods and Chattels, Lands & Tenements, if failure be made in the Condition Endorsed.*

Roger Mompesson.

THE Condition of the within written Recognisance is such, That if the said *Francis Makemie* do personally appear before Her Majesties Justices of the Supream Court of Judicature, to be held for this Province at the City of *New-York*, on the morrow of this Day, being *Tuesday* the Eleventh Day of *March* instant; there to answer all such matters and things as shall be objected against him, and shall not Depart without leave of the said Court, then the said Recognisance to be void.

Vera Copia. George Clarke.

The Grand Jury being called and Sworn the first day of the Term; and tho’ there was little besides this matter given to them in Charge, yet after sundry debates, several Meetings and Adjournments, found the following Presentment against *Francis Makemie*; the Queens Attorney, for Reasons best known to himself, gave nothing to the Grand Jury against *John Hampton*, who was dropt out of the Prosecution; tho’ both equally guilty of the same Crime, of Preaching a Sermon in the Government of *New-York*, and suffered equally by Imprisonment; from which both were Relieved by the former Writ of *Habeas Corpus*.

And

And to such as knew the Grand Jury, when called and sworn, they plainly appeared to be Chosen on purpose to find the Presentment, for some of them had never been upon a Grand Jury, others not for sundry years, and sundry of them Justices of the Peace, who at the Quarter Sessions had so far prejudged them and their Cause, as they refused to allow their Petition a publick reading, or take the least notice of the Certification of a House offered to Record at the same time, by two of the Inhabitants of *York*, and one of them threatened as to his Trade and Business, as appearing to countenance such a design: Yet with hard struggling, twelve was influenced, and the two last who made up the number, were persons of Dissenting Congregations from the Established Church of *England*, and their Teachers as liable to be prosecuted, as those Gentlemen, and as guilty of the same, or like Presentment. One *Daniel Cromline*, a *French* Refugee, dragoon'd out of *France* for the same Protestant Religion and Perswasion, and *Adrian Hogland*, of the *Dutch* Congregation, whose Minister has yet no Licence, being a new made Lieutenant to a Troop: After four of Mr. *Makemie's* Hearers, Capt. *John Thoobolds*, Mr. *John Vanhorn*, Mr. *Anthony Young*, and *Harris*, Coachman to Lord *Cornbury*, being Subpœna'd, gave Evidence upon Oath, they heard no unsound Doctrine, nor any thing against the Government; and one of the Evidences delivered to the Jury, the Act of Assembly of *New-York*, for *Liberty of Conscience to all, except Papists*, and shewed to them Mr. *Makemie's* Certificate from a Court of Record from *Virginia*, of his compliance with the Qualifications of the Act of Toleration; they notwithstanding at length consented to find the Indictment; whose Votes were, on *Friday* in the Afternoon, taken in a new and unusual method, as they came in one by one from Dinner.

Fryday the First Term.

The Grand Jury find the following Bill, which is ordered to be filed.

Of the Term of March, in the Sixth Year of the Reign of our Sovereign Lady ANNE, over England, &c. Queen.

City of New-York.

‘ **T**He Jurors for our Sovereign Lady the Queen, upon their Oath do Present, That *Francis Makemie*, late of the Province of *Virginia*, Gent. pretending himself to be a Protes-
‘ tant

‘ tant Dissenting Minister and Preacher, and contemning and
 ‘ endeavouring to subvert the Supremacy, Jurisdiction and Au-
 ‘ thority of our now Lady the Queen, in Ecclesiastical affairs,
 ‘ the two and twentieth day of *January*, in the Fifth Year of
 ‘ the Reign of our Sovereign Lady *ANNE*, over *England*,
 ‘ &c. Queen, at the City of *New-York*, aforesaid [to wit] at the
 ‘ Southward of the said City, did privately and unlawfully, take
 ‘ upon him to Preach and Teach, and did Preach and Teach
 ‘ diverse of Her Majesties Liege Subjects, within the said City
 ‘ [to wit] at the Dwelling-House of one *William Jackson*,
 ‘ situate in the Ward aforesaid, privately and unlawfully, then
 ‘ and there meet, and assembled together, to above the number
 ‘ of five persons at one time, under the pretence of Divine
 ‘ Worship, without any leave or Licence by him, the said
 ‘ *Francis*, first had, and obtained, according to Law for the
 ‘ same, in great derogation of the Royal Authority and Prero-
 ‘ gative of our Lady the Queen, and to the evil Example of all
 ‘ others, in the like case offending against the Peace of our Lady,
 ‘ the Queen, Her Crown and Dignity. And the Jurors afore-
 ‘ said, upon their Oath aforesaid, do further present, That the
 ‘ said *Francis Makemie* afterwards [to wit] the aforesaid two
 ‘ and twentieth day of *January* in the year aforesaid, at the
 ‘ City and Ward aforesaid, at the aforesaid Dwelling-house of
 ‘ the said *William Jackson*, did privately and unlawfully assem-
 ‘ ble, and gather together diverse of Her Majesties Subjects un-
 ‘ known, did then, and there voluntarily, and unlawfully, use
 ‘ other Rites, Ceremonies, Form and Manner of Divine Wor-
 ‘ ship, then what are contained in a certain Book of Common-
 ‘ Prayer, and Administration of the Sacraments, and of other
 ‘ Rites and Ceremonies of the Church of *England*, against the
 ‘ Form of the Statute in that case made and provided, and
 ‘ against the Peace of our said Lady the Queen, Her Crown
 ‘ and Dignity. And the Jurors aforesaid, do further present,
 ‘ that the said *Francis Makemie* afterwards [to wit] the two
 ‘ and twentieth day of *January*, in the fifth Year aforesaid, be-
 ‘ ing then, and now is a person, not qualified by Law to Preach,
 ‘ Teach and Officiate in any Congregation or Assembly for Re-
 ‘ ligious Worship at the City aforesaid [to wit] at the Southward
 ‘ of the said City, at the aforesaid Dwelling-house, of the said
 ‘ *William Jackson*, situate in the said Ward, did take upon him
 ‘ to Preach, Teach and Officiate, & then and there did Preach,
 ‘ Teach and officiate, in a Congregation, Assembly, Con-
 ‘ venticle & Meeting not permitted, or allowed by Law,
 ‘ under colour or excuse of Religion, in other manner then ac-
 ‘ cording

‘ cording to the Liturgy, and practice of the Church of *England*, &c. At which Conventicle, Meeting and Assembly, ‘ were five persons or more Assembled together, against the ‘ Form of the Statute, in that case made and provided against ‘ the Peace of our Lady the Queen, Her Crown and Dignity, &c.

A true Copy. *George Clark*, Secr.

Here is a Presentment for Preaching a Sermon at *York*, highly aggravated into a Cumulative Crime, and thereby the Grand-Jury, led into no small mistake, in point of time ; for it is said to be Preached on the two and twentieth day of January ; whereas it was preached on the twentieth of *January* : for these two Ministers were Lord *Cornbury*’s Prisoners, apprehended on *Long-Island*, on the two and twentieth day instant, by a Warrant, dated the one and twentieth day : Which error was cause enough in point of Law, for overthrowing the whole Presentment, which was so delayed and put off to the last day of the Court, that a Tryal could not be obtained that Court : Therefore Mr. *Reignere*, the Defendants Council made a motion, that the Defendants appearance be put upon Record, and it was ordered the Defendant be continued on his Recognizance, until the next Term : Mr. *Makemie* being the only person prosecuted, returns for *Virginia*, and returns again before *June* Term, the third of said Month.

Tuesday, the third day of *June*, 1707.

Province of

New-York. Present *Roger Mompesson* Esqr. Chief Justice.
Robert Milward } Esqrs. Justices.
Thomas Wenham }

The first day of the Term.

The Defendants Appearance is entered, and he is ordered to be continued on his Recognizance.

The Defendant ordered to plead to morrow.

Wednesday, *June 4th*.

The Defendant pleads not Guilty of any Crime, by Preaching a Sermon at *York*.

The Attorney General for the Queen moves to know, if they would allow a Copy of the Queens Instructions to the Governour, Signed by his Excellency, to be brought into Court, in

in Evidence at the Tryal, seeing his Excellency, who had the Originals, was then in the *Jerseys*.

The Defendant replied, they could admit of no Copies, seeing there was time enough to have produced the Original; or Mr. Attorney might have compared the Copy with the Original, and might have been able to give his Affidavit to the truth of said Copy; but perceiving if that Copy was not allowed of, the Queens Attorney would put off the Tryal till another time.

Therefore Mr. Attorney General for the Queen, & Mr. *William Nicoll* for the Defendant, agrees, that the Copy of such Instructions from Her Majesty to the Governour, as shall be produced by the Attorney General, and Signed by the Governour, shall be admitted on Tryal, to be the same in Evidence, as if the Original Instructions were produced. *F. M.* Defendant moved, that if allowed in Evidence, he might have a Copy of said Instructions; and further declared, he could not but wonder, of what Service these Instructions which were no Law, could do to Mr. Attorney, seeing the Presentment run upon Statutes and Acts of Parliament, and they expected to have a Tryal before a Court, who were Judges of Law, and not of private Instructions.

Friday, June 6th. 1707.

The Petty Jury called, whose names follow according to the Pannill, and twelve of them Sworn to try the matter in issue, and the Defendant told the Court, he was under great disadvantage, being a Stranger, and knew neither names nor faces; And tho' he knew he had not liberty in that cause, of peremptory objections against any, without showing sufficient ground of exception; but he was informed of one, Mr. *Elias Neau*, who had in discourse to Mr. *Anthony Tounge*, prejudged the Cause, by condemning him for Preaching a Sermon, and justified Lord *Cornbury's* proceedings against him; which being proved by the Deposition of said *Young*, was approved of by the Judge, as a good objection in Law. The Defendant further adds, he was amazed to find one who was so lately dragooned out of *France*, for his Religion, and delivered out of the Gallies, so soon prove a Persecuter of the same Religion, for Preaching a Sermon in this City.

The Jurors being Sworn, you may take their Names following.

John Shepherd Foreman
Thomas Ives

Andrew Lauron
Humphrey Perkins

Joseph

Joseph Wright
Thomas Woorden
Joseph Robinson
Bartholomew Laroux

William Horswell
Thomas Carrell.
Thomas Baynex.
Charles Cromline.

Mr. Attorney produced a Copy of the Queens Instructions, Signed by Lord *Cornbury*, and allowed of by both parties in Evidence, as if the Original were present, and tho' a Copy was denied again and again to the Defendant, yet by a Copy of Instructions from King *William* to a former Governour, the same Instructions were found, in the same words; and as they were in two Paragraphs in the produced Copy, so they were found at a great distance from one another in the former Copy, supposed to be agreeable to the Original, and to be two distinct and vastly different Instructions; one of them relating to the Dissenters, the other relating to the Ministers of the Church of *England*, as may plainly appear from the Instructions themselves in the following words.

And you are to permit a Liberty of Conscience to all Persons (except Papists) so they be contented with a quiet and peaceable enjoyment of it, not giving offence or scandal to the Government.

You are not to permit any Minister coming from England, to Preack in your Government, without a Certificate, from the Right Reverend, the Bishop of London: Nor any other Minister, coming from any other part or place, without first obtaining leave from you, our Governour.

Mr. Attorney Orders four of Mr. *Makemies* Hearers to be called, Cap. *John Thoobolds*, Mr. *John Vanhorn*, Mr. *William Jackson*, and Mr. *Anthony Young*, who answered to their Names.

The Defendant perceiving they were summoned and called, to give their Evidence to the matter of Fact; told the Court, that the Swearing of these four Gentlemen as Evidences, would but give a needless trouble, and take up the Courts time; and he would own the matter of fact as to his Preaching, and more than these Gentlemen could declare upon Oath; for he had done nothing therein, that he was ashamed or afraid of, but would answer and own it, not only before this Bar, but before the *Tribunal of Gods Final Judgment*. And so Mr. Attorney proposed, and Mr. *Makemie* answered the following Questions, or to the same purpose.

Mr.

Mr. Attorney. *You own, that you Preached a Sermon, and Baptized a Child at Mr. William Jacksons.*

F. M. Yes, I did.

Mr. Attor. *How many Hearers had you?*

F. M. I have other work to do, Mr. Attorney, then to number my Auditory, when I am about to Preach to them.

Mr. Attor. *Was there above five hearing you?*

F. M. Yes, and five to that.

Mr. Attor. *Did you use the Rites and Ceremonies enjoined by, and prescribed in the Book of Common Prayer, by the Church of England?*

F. M. No, I never did, nor ever will, until I am better satisfied in my Conscience.

Mr. Attor. *Did you ask leave, or acquaint my Lord Cornbury with your Preaching at York, when you dined with him at the Fort?*

F. M. I did not know of my Preaching at York, when I dined with his Excellency, no, not for some days after: For when we came to York, we had not the least intention, or design of Preaching there; but stopt at York, purely to pay our respects to the Governour, which we did; but being afterwards called, and invited to Preach, as I was a Minister of the Gospel, I durst not deny Preaching, nor I hope ever shall, where it is wanting and desired.

Mr. Attor. *Did you acquaint my Lord Cornbury with the place of your Preaching?*

F. M. As soon as I determined to Preach, leave was asked, tho' not by me; for it was the peoples business, and not mine, to provide a place for me to Preach in: And I would have been admitted to Preach in the Dutch Church, but they were affraid of offending Lord Cornbury; and Mr. Anthony Young went to the Governour, to have his leave, or permission for my Preaching in the Dutch Church; tho' all this was done, without so much as my knowledge: But my Lord opposing and denying it, I was under a necessity of Preaching where I did, in a private House, tho' in a publick manner with open doors. Mr. Attorney in pleading, first read over the Indictment which the Grand Jury found, and endeavoured to prove the several parts thereof, by giving a large and full account of sundry Statutes of K. Henry the 8th, asserting and establishing the Supremacy of the King over all Ecclesiastical Persons and Affairs, in his Dominion of England. And from thence asserted the Queens Supremacy in Ecclesiastical Affairs, and over Ecclesiastick persons; which Supremacy was by a Delegation lodged in his
Excellency

Excellency our Governour, which he is sworn to exercise; and this is signified to him by Her Majesties Instructions, which were read in Court. Then he proceeded to produce, and read as much as was necessary, of those Statutes of Queen *Elizabeth*, and King *Charles* the Second, *For Uniformity of Worship according to the Rites and Ceremonies of the Church of England; and the Penal Laws against Conventicles*: And enlarging his pleadings on these points; he turns to the Gentlemen of the Jury, and says, the matter of fact is plainly confessed by the Defendant, and I have proved it to be repugnant to the Queens Instructions, and sundry Acts of Parliament of *England*: Therefore did not doubt, but the Jury would find for the Queen, and against the Defendant.

Mr. *Ja. Reignere*, Attorney for the Defendant, pleads against Mr. Attorney for the Queen, as followeth: The Indictment charges three distinct and separate facts as Crimes against the Defendant.

1. That he, a pretended Protestant Minister, endeavouring to subvert the Queens Supremacy, Jurisdiction and Authority in Ecclesiastical Affairs; did privately and unlawfully Preach and Teach, at *William Jacksons* House, diverse Subjects, privately and unlawfully, to above five in number, without Licence had according to Law, in derogation to the Royal Authority and Prerogative, to the evil example, & *cont. Par.*

2. That he did assemble diverse unknown, and unvoluntarily, and unlawfully use any other Rites and Forms of Worship, then are in the Common-Prayer and Rites and Ceremonies of the Church of *England*: *Cont. Form. Stat.*

3. That being not qualified by Law to Preach and Teach in a Congregation or Meeting not allowed by Law, in other manner then according to the practice of the Church of *England*; at which Meeting were five persons, or more assembled, *Cont. Form. Stat.*

As to the Indictment, *ut supra*, that the Defendant did not Preach privately, nor the persons assemble privately, *i. e.* with doors lockt, barr'd or bolted; nay, it appears by the Evidence, and agreed to the contrary by Mr. Attorney General: that the people met unlawfully, must appear by the violation of some known Law or Statute, in force here, by which such Meeting and Preaching is forbidden; that is to say, the Preaching above five.

I take this Colony, as a Dominion of *England*, to be governed by, and subject to these three sorts of Laws: 1. The Common

mon Law of *England*. 2. The express Statutes mentioning the Plantations, and such other as are for publick good (as the Chief Justice was pleased to say in this Court, in the Case depending between *Smith* and *Davis*). 3. By the Laws of this Colony, and those are to be as near as may be agreeable to the Laws and Statutes of *England*; and the Judges of this Court (I dare say) will examine and determine no fact, but according to the mode and rule of some of those Laws.

That Preaching without Licence, and assembling above five is a Crime at Common Law, I never read, and it is not alleadged to be against any Statute; it must be an offence against some Law of this Province, which as yet I never saw, and desire I may now see it; and if such does not appear, then undoubtedly *where there is no Law, there can be no transgression.*

As to what is offered by Mr. Attorney, that the Queen, as Supream Head of the Church of *England*, hath power to make Ordinances, and punish for breach thereof; that this power is delegated to the Governour, who is bound by Oath to Execute them.

Supposing and admitting all this; yet nothing like an Ordinance appears: for the Instructions produced by Mr. Attorney cannot have the force of a Law or Ordinance, especially against persons to whom they were never communicated; what they may be to those to whom they were given, who alone hath the Custody of them, and conceals them from publick view.

As to the two Articles in the Indictment; *Cont. Form. Stat.*

Now there are diverse Statutes made in *England*, which enjoin a due observance of the Rites and Ceremonies of the Church of *England*, as the 1st of *Eliz. C. 2d.* 2. *Eliz. C. 1.* Twenty pound a month for not going to Church; 29 *Eliz. C. 6.* the same 3 *James, C. 4, & 5.* But all these were pointed and levelled at Romish Recusants only, tho' sometimes misconstrued to extend to others; also 35 *Eliz. C. 1.* forbidding all Meeting & Conventicles, under penalties of abjuration & publick submission, did the 16 *Car. 2d.* now expired, and the 22 *Car. 2.* but all restricted to *England, Wales, and Berwick on Tweed*; but if they had not, as they are positive and additional, they shall be confined strictly to place and words; then the practice of all the Colonies and Plantations, and the Laws made in some of them, for the Establishment of the Church of *England*, but no such Establishment here; but on the contrary, a Law formerly made in this Province, and in Print, allowing Liberty of Conscience, which I here insert in the following words.

The

The last Clause of an Act of Assembly, made in the Government of *New-York*, declaring the Rights, and Privileges of the Subject.

That no person or persons, which profess faith in God, by Jesus Christ, his only Son, shall at any time be any way molested, punished, disturbed, disquieted, or called in question, for any difference in opinion, or matter of Religious Concernment, who do not under that pretence disturb the civil peace of the Province, &c. And that all and every such person and persons, may from time to time, and at all times hereafter, freely have, and fully enjoy, his or their opinion, perswasion and judgment, in matters of Conscience and Religion, throughout all this Province; and freely meet at convenient places, within this Province; and there Worship according to their respective perswasions, without being hindred or molested, they behaving themselves peaceably, quietly, modestly and religiously; and not using their Liberty to licentiousness, nor to the civil injury, or outward disturbance of others. Always provided, that nothing herein mentioned or contained, shall extend or give liberty to any persons of the Romish Religion, to exercise their manner of Worship, contrary to the Laws and Statutes of Their Majesty's Kingdom of England.

And tho' Mr. Attorney endeavouring to invalidate this, by denying this Law to be in force, yet could not prove this Law abolished.

And by one of the Instructions, which Mr. Attorney produced, *in totidem verbis*, is the same, that has been given to former Governours of this Province, Liberty of Conscience is directed to be allowed.

As to the Third Article in the Indictment, that seems to refer to the first of *William and Mary*, of Toleration; but as we say, the Pænal Statutes did not extend hither, so is there no occasion of Toleration. The Laws and Statutes of *England* by their own force, extend equally to all Plantations of *England* alike; and if these Pænal Laws did extend to the Plantations, the Crown of *England*, would never Tolerate the Governments of *Boston*, *Rhode-Island*, *Connecticut*, and others; who in their Church-Discipline are so far from Conforming to the Church of *England*, that they have Set up and Established another sort of Church-Discipline universally among them; but notwithstanding this, they are allowed the liberty they always used in their Church without molestation, and were so allowed in the very time when these Pænal Laws were in force in *England*; but now since by the late Act of Toleration, it was thought by the

the wise and experienced Legislators of *England*, to be for the *Publick Good*, to repeal these Laws, even there, for which place only they were made, and to allow Liberty of Conscience ; I hope it will never be thought, that those Pænal Statutes, so repealed, are, or can be for the *Publick Good* here, and as such extended hither. Wherefore, forasmuch, as neither by the Common Law of *England*, nor by any Law of this Province produced, or even alleaded by Mr. Attorney, such Preaching or Meeting, doth appear unlawful (but on the contrary, an express Law of this Province doth allow it, as hath been shewen) and that the Pænal Laws and Statutes of *England* against Dis-senters, can by no reasonable construction, be extended hither, I humbly conceive my Client is not guilty of any offence against Law, and hope the Jury will acquit him accordingly.

Mr. *William Nicol*, Attorney for the Defendant, pleads in the next place, as followeth.

Mr. Attorney has been entertaining us with some History from the Reign of K. *Henry 8.* And it is fit we should entertain him with some History also, more ancient, and from better Authors, and that is from the Acts of the Apostles ; for we do find, that Teaching, or Preaching, or Speaking in it self, or by the Common Law, was never found a Crime ; for the Apostle *Paul* Preached a very new Doctrine to the *Athenians*, which was an ancient Commonwealth, and was not Condemned or Imprisoned for it, but they were curious to hear again, *Act. 17.* concerning the new Doctrine of the Resurrection ; but we find, when the same Apostle began to insist on any Doctrine which tended to infringe the gain of the Silver Smiths, who *Act. 18.* made Shrines for *Diana*, the Goddess of the *Ephesians*, they were enraged, and made an uproar against him, rushing into the Theatre ; but it was no Crime, either in *Corinth* or *Athens*, where no man was hurt by the Doctrine itself, neither was obstructed by, nor any offence to the Civil Government.

And it is plain, it was no offence at Common Law, but was made so by the old Statutes of 5 *Rich. 2. Cap. 5.* 2 *Hen. 4. Cap. 15.* 2 *Hen. 5.* But all these Statutes being repealed by 1 *Ed. 6.* and by Acts of *Eliz.* it was still no transgression, but remains as it was, no crime at Common Law.

And the four Statutes against Conventicles in *Ch. 2.* are all local, and in express words, limited to *England, Wales,* and *Berwick on Tweed*, so have no relation, to, nor reach to any of the Plantations.

And this is further manifest, from the Constitution of the Plantations,

Plantations, being as it were settled by National Consent, for those whose thoughts in Religious Affairs could not square with the Publick Establishment in Church Government, Discipline and Ceremonies, as *New-England* for Independants and Presbyterians, *Rhode-Island* and *New-Jerseys*, and we may add *New-York*, for the several sorts of Dissenters in general; *Pennsylvania* and *Maryland*, for Quakers & Papists in particular.

And this being the first that was prosecuted in this nature in the Plantations, is made the more remarkable, so long after the news of those harsh Statutes of *Ch. 2.* have been cut by the Statute of 1. *William & Mary.*

And it is already evidently proved, that the Acts of Assembly of *New-York*, allow Liberty of Conscience, with freedom of Publick Worship, to all but Papists.

What was offered on the other side, by Mr. Attorney, as being against the Queens Prerogative in Ecclesiastical Affairs, was foreign, and not at all to the purpose; for all the Statutes relating to that matter, being to assert the Queens Empire, and Jurisdiction over Ecclesiastical Persons, as well as Lay-men, in opposition to the Claim and Usurpation of the See of *Rome*, to exempt the Clergy, or Church-men, from the Civil and Secular Power.

And as to the Queens Instructions, they are not, neither can have the force of a Law; besides that, these two Instructions produced in Court, are no way against us, but rather for us.

Mr. *David Jamison*, Attorney for the Defendant, appears next to plead in the following manner.

Mr. *Reignere*, and Mr. *Nicol*, Attorneys on the same side, having offered so many and large Arguments, have left but little room for new matter to be offered, without enumerating what was offered upon the three heads of the Indictment.

As to the first, which was Preaching and Teaching without Licence, against the Queens Supremacy and Prerogative in Ecclesiastical Affairs. We did not come here to oppose, or call in question the Queens Prerogative or Supremacy: but were willing to pay all due respect & deference thereunto; but we cannot see, that these Instructions from the Queen to my Lord *Cornbury*, of which Mr. Attorney has produced a Copy, and which he alleadges to be the Law we have broken by Preaching, contrary to the Queens Instructions, which are not a Law to any body else, but to his Lordship, who is directed by them, and is accountable to the Queen, if he do not observe them. Her Instructions are private directions to himself, and can be no Law to others: Promulgation is that which gives the finishing stroke

stroke to a Law. Nor do I see how his Lordship should become guilty of breach of Oath, as Mr. Attorney was pleased to offer, by not ordering the prosecution of this Gentleman, for Preaching without his Licence; altho' he be Sworn to obey and observe his Instructions, because the very Instructions produced, give Liberty of Conscience to Protestant Dissenters, and are in two distinct Paragraphs; the first seems to me wholly to agree with our Act of Assembly of this Province, is to the same purpose, and very near the same words; the other Paragraph is negative: *You are not to permit any Minister coming from England, to Preach in your Government, without a Certificate from the Right Reverend, the Bishop of London; nor any other Minister coming from any other Part, or Place, without first obtaining leave from you our Governour.* And a Dissenting Minister Preaching here without the Governours knowledge, could be no breach of his Oath, because it was done without his knowledge, and consequently without his permission.

To the Second, as to the Statutes of *Eliz.* and *Charles 2.* against Conventicles, they were limited and local Acts or Statutes, and could not any way reach these Plantations; for here in *New-York* we have no Established Religion for the whole Province. On the East-end of *Nassaw*, or *Long-Island*, were, and always have been Independant Ministers, the *French* had their own way and Ministers, and the *Dutch* in like manner; the very *Jews* and *Quakers* have the free Exercise of their Religion; and there is not one Form of Worship Established for the whole Province. The 16th. as well as 22 of *K. Charles 2.* are limited to the Kingdom of *England*, Dominion of *Wales*, and Town of *Berwick* upon *Tweed*; and therefore the using of any other Form of Worship in this Province, then what is contained in the Common-Prayer, cannot be a Breach of those Statutes. Then again the 16 of *Ch. 2.* for suppressing Conventicles, makes the third default Banishment, for seven years into the Plantations (*New-England* and *Virginia* excepted;) And how can it be supposed, that the Plantations the places to which the defaulters were to be Banished, can be understood to be comprehended within the meaning and penalty of that Statute; that did continue in force, for little more time than four years. The other of the 22d. did supply its room, and had much more mild penalties.

As to the third, which is that he Preached without being qualified, that is laid against the Act of Toleration. I did offer, that this Statute likewise was not, nor is in force in the Plantations

Plantations generally, especially in this Province, altho' there be no locality expressly mentioned therein, and that for these Reasons. The title and whole design of it is Toleration ; now Toleration is an exception from some restraint ; and since the Pænal Laws are not of force here by consequence, neither is the Act of Toleration of force, here is no Established Church for the whole Province ; from which we should be tolerated. We have had Liberty of Conscience another way, and by an Act of Assembly, which was made in the beginning of the Reign of *K. William* and *Q. Mary*, during the Government of *Col. Fletcher*, not yet formally repealed. Then again consider the Preamble of the Act of Toleration, to the end that all our Protestant Subjects, may be united in interest and affection ; the wisdom of the Nation did at that time combine, to put an end to all Persecution on the score of Religion. Our Assembly was much of the same mind, designing to prevent it, and so are all good men : when we did set about erecting a Church of *England* Congregation in this Town, and obtained a Charter for the same, of Governour *Fletcher* ; altho' we were desirous to have the National Worship amongst us, yet was it the care of these Members, who promoted it, to get such Clauses inserted in it, as should secure the Liberty of the *Dutch* and *French* Congregations from our Successors ; and in an Act of Assembly made since, for its encouragement, the like care and precaution was had ; which are still to be seen.

This Province has not been much more than forty years in the possession of the Crown of *England*, and is made up chiefly of Foreigners, and Dissenters ; and Persecution would not only tend to the disuniting us all, in interest and affection, but depopulate and weaken our Strength, and discourage all such Adventurers for the future. Therefore as this Prosecution is the first of this nature or sort, ever was in this Province, so I hope it will be the last.

The Defendant prayed, he might have liberty to speak for himself, which was granted ; and he pleaded in his own defence, the following Arguments, which I publish in his own words.

F. M. I am amazed to find Mr. Attorney so much changed in his opinion ; for when I was before my Lord *Cornbury*, who told us, the Act of Toleration was limited and local, and extended not to the Plantations : And Mr. Attorney being pleased to confirm it, by asserting the same thing, and went a little further, by producing an Argument to strengthen his opinion, That the Pænal Laws of *England*, did not extend to the Plantations,

tations, and the Act of Toleration was made to take off the edge of the Pænal Laws; Therefore the Toleration does not extend hither; but we find soon after by an Indictment, both the Pænal Laws and Toleration reaches hither, and all their penalties too.

The Honourable Chief Justice, *Roger Mompesson Esqr.* interrupted the Defendant, by saying: Gentlemen, *Do not trouble the Court with what discourse passed between you, before my Lord, or at any other time, but speak to the point.*

F. M. May it please your Honour, I hope to make it appear, it is to the point; and what was Mr. Attorneys argument then, is now mine: For whatever opinion I was of, while an absolute Stranger to *New-York*, and its Constitution; yet since I have have informed my self thorowly with the Constitution of this place, I am intirely of Mr. Attorneys opinion, and hope he will be of the same still.

And as to the Indictment, to return to the particulars thereof; and first, I am charged with contemning, and endeavouring to Subvert the Supremacy of the Queen in Ecclesiastical Affairs. As to the Queens Supremacy about Ecclesiastical persons and things, we allow and believe, She has as large a Supremacy, as in the Word of God is allowed to any Christian Kings and Princes in the World; and our Confession of Faith, which will compare with any in the World, and is universally known to the Christian World, is very full in that matter; a part whereof is judged necessary to be inserted here, for the information of many.

Chapter 23. Concerning the Civil Magistrate.

1. **G**Od the Supream Lord and King of all the World, hath Ordained; Civil Magistrates to be under him, over the People, for his own Glory, and the Publick Good; and to this end hath armed them with the power of the Sword, for the defence and encouragement of them that do well, and for the punishment of evil-doers.

3. The Civil Magistrate may not assume to himself the Administration of Word and Sacraments, or the power of the Keys of the Kingdom of Heaven; yet he hath Authority, and it is his duty to take order, that Unity and Peace be preserved in the Church, that the truth of God be kept pure and intire; that all Blasphemies and Heresies be suppressed, all corruptions and abuses in Worship and Discipline, prevented and reformed; and all the Ordinances of God may be settled; for the better effecting whereof, he hath power to call Synods to be present at them,

them, and to provide that whatsoever is transacted in them, be according to the Mind of God.

4. It is the duty of People to Pray for Magistrates, to honour their Persons, to obey their lawful Commands, and to be subject to their Authority, for Conscience sake: Infidelity or difference in Religion, doth not make void the Magistrates just and legal Authority, nor free the people from their due Obedience to him; from which Ecclesiastical Persons are not exempted: much less hath the Pope any power or Jurisdiction over them, in their Dominions, or over any of their people, and least of all to deprive them of their Dominions or Lives, if he shall judge them to be Hereticks, or upon any pretence whatsoever.

And in all which Mr. Attorney has offered concerning the Queens Supremacy in Ecclesiastical Affairs, I cannot learn one argument, or one word, from all the quoted Statutes, that Preaching a Sermon, is the least contempt, or overthrow of the Supremacy. And I hope it is not now unknown to any, that the Oath of Supremacy, has been abolished by a Law, ever since the Revolution, and consequently the Subject must be delivered from some obligation thereby: and how far this will be constructed to extend, I leave to the Judges to determine.

And as to my Preaching without Licence first obtained from Lord Cornbury, which is asserted to be against Law; I cannot hear from any Law yet produced, that *Ld. Cornbury* has any power or directions to grant a Licence to any Dissenters, or that any of them are under any obligation, to take Licence from his Lordship, before they Preach, or after. Mr. Attorney pretends no Law, unless he concludes the Queens Instructions to be a Law, or have the force of a Law: That they have no force of a Law, has been abundantly proved already; neither am I any way culpable even from the Queens Instructions, which are produced in Court; for they consisting of two parts, or rather two distinct Instructions, not relating at all to the same persons: *In the first*, his Excellency is required to permit a Liberty of Conscience to all persons except Papists. And this is the Liberty is allowed to Dissenters and which we claim, by virtue of this Instruction: and here is no Licence mentioned and required; for permission is a negative act, and implies no more but this; you shall so allow it, as not to hinder, molest or disquiet them, but rather protect them in it: And Papists being particularly expressed, it cannot be applied to the Church of *England*; therefore Dissenters are intended by this

this Instruction, and no other ; and if this permission is granted us, according to the express words thereof, we desire no more. And it cannot be esteemed by any, that imprisoning and punishing of us at such a rate, for Preaching one Sermon, is a permitting us Liberty of Conscience. *The other distinct Paragraph*, or rather, the other Instruction, which tho' joined together in this Copy, are at a considerable distance from one another in the Original ; as we really found it so, in a Copy of Instructions to a former Governour : And as the former concerns Dissenters, so this is intended for the Clergy of the Church of *England* ; for the words of the Instruction, as you have it above, are these : *You are not to permit any Minister coming from England, to Preach in your Government, without a Certificate from the Right Reverend, the Bishop of London, nor any other Minister coming from any other part or place, without first obtaining leave of you, our Governour.* Here is another Instruction, which should not be produced or improved against Dissenters ; for all mankind, and those of the meanest capacity must conclude and determine, that this concerns only the Clergy of the Church of *England*, who by their Constitution, are under strict obligations to take Licence, or Certificate from their Ordinary, and such as come to the Plantations, acknowledge the Bishop of *London* as such ; and no Dissenter, either in *England*, or any where else in the Queens Dominion, ever took, or ever was under any obligation to take any Licence from the Queens or Kings of *England*, or any other Person or Persons whatsoever ; until a method & practice has of late been erected, and forced into practice at *New-York* : For if our Liberty either depended on a Licence or Certificate from the Bishops of *England*, or the Governours of *America*, we should soon be deprived of our Liberty of Conscience, secured to us by Law, and repeated Resolutions of our present Sovereign, and Gracious Queen, inviolably to maintain the Toleration which She is pleased to signify in Her Royal Instructions to all Her Governours abroad ; which we are the more assured of, from the Instructions produced in this Court. So that as the first clause of this latter Instruction, cannot be applied to any other Ministers, but of the Church of *England* ; so the latter clause can be understood of no other but the same sort, or species, as those who came from *England* with Certificate from the Bishop of *London* : And it is well known, there are Ministers of the Church of *England*, who may come, and do come not directly from *England*, but from some other place, as from sundry Plantations of *America* ; as Mr. *Sharp* now Chaplain at *Fort-Anne*,
came

came not directly from *England*, but from *Maryland*: And I must confess, he being a Minister of the Church of *England*, and enjoys a considerable Benefice thereby, was obliged to comply with the Constitution of his own Church, and take a Licence from *Id. Cornbury*, if none could be produced from the Bishop of *London*. But all this is foreign to us, and not at all required of any Dissenter in *Europe* or *America*.

And if there had been any thing in these Instructions requiring Dissenters to take any Licence, or empowering Governours of the Plantations to grant them, which we do not find; Preaching a Sermon before such Licence, cannot be judged a Crime, deserving such a Confinement and Prosecution as we have met with; for it has been already made appear, that those Instructions cannot have the force of a Law, to bind the Subject to Obedience, or render him culpable for Disobedience, seeing Promulgation, which is the Life of the Law, and renders all persons inexcusable, never as yet have accompanied these Instructions: So if this be Mr. Attorneys Law we have broke, by not obtaining Licence before Preaching, I hope, you Gentlemen of the Jury cannot but find, we are no way culpable hereby, being neither inconsistent with the Queens Instructions, and not against any Law.

And as to the last part of the Indictment, concerning the Pænal Laws, or the sundry Statutes against Conventicles, they never were designed, nor intended by our *English* Legislators for *America*, or any of the Plantations thereof; for they are limited & local Acts, all of them restricted to *England*, *Wales*, and *Berwick upon Tweed*, as is manifest from the express words of said Law; neither have been ever put in execution in any of the Plantations, until now; yea, have not been executed, even in *England*, *Wales* or *Berwick upon Tweed*, for which they were Calculated, and made, these twenty years past: And when they were put in the most strict and rigorous Execution in *England*, which was about the last of the Reign of K. Ch. 2. The Dissenters of *America* lived very quiet, and even in such Plantations where the Church of *England* has a full and formal Establishment. But which is more, even *Roman Catholics*, who are excluded from all benefit of the Act of Toleration in *England*; yet cannot be touched in *America*, by these Pænal Laws; for it is matter of fact known to all, and I appeal to Mr. *Reignere* if Papists have not liberty, and the exercise of their Religion, without molestation from Pænal Laws, and even in *Maryland*, where the Church of *England* has a formal establishment

establishment by Laws made there : And it is manifestly known, the Assembly of *Maryland* made a late Act against *Roman Catholics*; and tho' it was never executed, not being approved of by the Queen, yet it is a plain demonstration, if the Pænal Laws of *England* originally and principally designed against *Popish Recusants* had extended to the Plantations, there would have been no need for such an Act of Assembly to be made against them in *Maryland*.

It is a further argument the Pænal Laws never did extend to the Plantations, because it was a penalty in some of them, that persons after sundry and so many convictions, are to be banished or transported to the *American* Plantations, as places removed beyond, and free from the lash of Pænal Laws; for to what purpose would their banishment be, if after a removal from their Native Land, they should be lashed, or ruined afresh by the same Pænal Laws.

And if the Pænal Laws of *England* do not extend to these Plantations, where the Church of *England* has a legal and formal Establishment, it cannot be imagined, they can take place where there is no particular Perswasion established by Law; and consequently all Perswasions there are upon an equal bottom of Liberty, as I find to be the Case with *New-York*, where there is not one Act of Assembly, wherein the name or manner of Worship as it is in the Church of *England* is so much as expressed: And where there is no legal Establishment or any penalties or restrictions on the Liberty of any Dissenters, there is no room for, or need of any Toleration; for where no penalty, what must we be tolerated from; but pure nullities, or nothings, which seems inconsistent with the thing it self: Therefore in *New-York* Government all Perswasions there are upon an equal level, and bottom of liberty; and this confirmed to all Dissenters, except Papists, and allowed by an Act of Assembly, already read in open Court. And if *Jews*, who openly blaspheme the Lord Jesus, *Quakers* and *Lutherans*, and all other or most perswasions are allowed even in this Government; it is matter of wonder, and I can know no reason, why we only should not be allowed of, but put to molestation as we now are, by my present prosecution: Is it because we are Protestants? Is it because we are likest the Established Church of *England* of any Dissenters? Is it because we are the most considerable Body of Protestants in the Queens Dominions? Is it because we have now since the Union, a National Establishment in *Great Britain*, as nighly related and annexed unto the Crown of *England*, as the Church of *England* themselves? Sure such

such Proceedings, when known, will and must be a prodigy to *England*.

Mr. Attorney replied, it was impossible for any man to answer all which was offered, there was so much delivered, and by so many.

The Defendant told Mr. Attorney, he verily believed it was impossible for Mr. Attorney to answer what was said, and that it was a great truth Mr. Attorney asserted.

Mr. Attorney proceeds to answer, and says: These Gentlemen on the other side assert all the Pænal Laws of *England* are local & limited to *England*, *Wales*, and *Berwick upon Tweed*; but I shall produce one that is not so, but extends to all the Queens Dominions; and that is the Act of Uniformity, made the first of *Elizabeth*, which is demonstrated from the very words of said Law, *or other place within this Realm of England, Wales, and the Marches of the same, and other the QUEENS Dominions*: And flies to the Instructions again, and endeavours to assert and vindicate the Supremacy, and says, the Kings and Queens of *England*, Enjoin and Command their Governours to grant Licences; and it has always been customary, and an universal practice to take Licences from Governours: And those Ministers who come from other places, must be the same that my Ld. is to allow Liberty of Conscience unto.

The Defendant begged leave to answer the Attorney as to his last Argument, as to the first of *Elizabeth*, which is the Act of Uniformity; we acknowledge it was extensive to the Queens Dominions in general, and not limited to *England*, and *Wales* only; yet I hope to make it appear, this Act does no way affect the Plantations, and far less affect Dissenters; therefore is altogether foreign to our present purpose. For 1. That Act of Parliament was made in the first year of the Reign of *Elizabeth*, and consequently before any Plantation had a being, or was thought of, and so could have no relation to them at all, they being pure non-entities at that time. 2. All over the Act, and in sundry places thereof, it is directed to Ministers, Parsons or Vicars in Cathedrals, Parish-Churches, Private Chappels, or Oratories; and not a word in the whole Act of Dissenters or Conventicles. For 3. At that time, when this Act was made, there were not strictly and properly speaking, any number of Dissenters in *England*, who held Separate Meetings from the Publick and Established Worship; for tho' there were those in the Church of *England*, who always from the beginning of the Reformation scrupled the use of all the Common Prayer, and

omitted

omitted some Ceremonies, which was, and is to day, the grounds of the Separation; and it was to oblige such to an Uniformity in Publick Worship. And as soon as the Act was made, and put in Execution, with all its penalties, many were discouraged, others Cast out of the Church, for Nonconformity; and this really made the Separation, and all the mischiefs of the Separation are originally owing to this Act; tho' as soon as the Separation was made, they could not touch Dissenters by the penalties of this Act, therefore were under a necessity of making new Acts of Parliament in the following Reigns, for punishing Separated Dissenters; all which were limited and local in express words; and never designed to pursue Persecuted Persons to an *American* Wilderness. 4. I am able to make it appear, if this Act of Uniformity were strictly put in Execution, the most of the Clergy of the Church of *England*, would fall under its lashes and penalties; for none of them are to use any other Rite, Ceremony, or open Prayer, but what is mentioned and set forth, in the said Book of Common-Prayer. And it is well known, the most valuable men in that Church use another Publick Prayer, then is in Common Prayer, and all such persons are so far Dissenters, and being in Communion with the Church of *England*, are only liable to be Prosecuted upon this Statute.

And as to the Queens Instructions, which Mr. Attorney insists so much upon, it was, and is obvious to every man, they were two distinct Instructions; and tho' we have them placed so near in this Copy, they have no affinity one to another; and it is not fair for Mr. Attorney to take the latter clause of one Instruction, and join it to another, which was before; this is a Curtailing the Queens Instructions: whereas those who composed them, knew better how to join them together, then Mr. Attorney does.

And whereas Mr. Attorney affirms, that giving and taking Licence was very common and universal; I am well assured there never was, neither is to this day any such practice in any Plantation of *America*; and there were but few persons, as yet in *York* Government that had Licences; for besides the two *Dutch* Ministers, who differ upon *Long-Island*, and it is said Licences are the cause of their difference; there is but one *English* Nonconformist Minister, in all the Government, who has taken a Licence; and it is as certain, Mr. *Dubois*, and sundry others of the *Dutch* Churches has no Licence, neither will submit to any such as are granted.

Mr. Attorney perceiving how matters then stood, moves that
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the Jury should bring in a special Verdict, and the Judges inclined thereunto; for says Mr. Attorney, the matter of fact is plainly confessed by the Defendant, as you have heard, and you are to bring it in specially, for you are not Judges of Law.

F. M. May it please your Honours, I am a Stranger, who live four hundred miles from this place, and it is known to the whole Country, what intollerable trouble I have been put to already, and we cannot consent to a special Verdict, for that is only to encrease my trouble, multiply my Charge, and give me further delay: And it is a known truth in Law, that Strangers are to be favoured always with expedition in Justice, and does no way approve of delays; and if this should be allowed of, no mans innocence is able to protect him; for if I am cleared, I should suffer more in Charges at last, then if I were really guilty of the breach of many Pænal Laws of *England*: And as to the Juries judging of Law, and confessing the fact, I cannot see one point of the Law to be judged; for that the Pænal are local and limited, that is owned on all hands, and Pænal Laws are strictly to be taken and interpreted, and not allowed to the ruin of the Subject, to extend, or be interpreted beyond the plain and strict sense of the words. It is also true, we have confessed Preaching a Sermon at the House of Mr. *William Jackson*, with all its true circumstances; but we have not owned this to be a crime, or repugnant to any Law, or inconsistent with any of the Queens Instructions yet produced to us; neither has Mr. Attorney made any thing of this yet appear; for all those ancient Statutes of *II. the 8th* tend only to throw off, the Authority, Supremacy and Jurisdiction of the Popes, and See of *Rome*, and invest the Kings and Queens of *England* with that usurped Authority of the Popes, and to bring Ecclesiastical persons, under the civil Jurisdiction of *England*, who in times of Popery were made only accountable to the See of *Rome*, and that Jurisdiction; therefore does not touch, neither is any way applicable to this Case.

Mr. Attorney, *These Gentlemen acknowledge, and say, the Ministers of the Church of England are to take Licences, and obliged so to do; and if so, the Dissenters should also, otherwise they must expect more favour and liberty then the Ministers of the Church of England.*

F. M. I must confess, the Case is very different; for it is the opinion and constitution of the Church of *England*, that notwithstanding their Ordination, they are not to Preach or Officiate as Ministers, until they procure, or have a Licence from their Bishop, or Ordinary, which no Dissenting Minister is concerned

cerned with ; and they voluntarily and freely bring themselves under an Oath of Canonical Obedience, to obey their Ordinary ; and if he require them to take Licences, or any thing else they must, they are sworn to submit thereunto. But finally, There is a great deal of reason, why Ministers of the Church of *England* should submit to Licence, but we are not ; because it is only *bare liberty* which Dissenters have ; but they have not only *Liberty*, but a considerable *Maintainance* also ; without which, I never knew any of them value *Liberty* only ; and Dissenters having liberty only without any Maintenance from the Government, are not at all under obligations, neither is it required of them to take Licences of any.

After a long debate and fair pleadings, The Honourable *Roger Mompesson*, Chief Justice, applies himself to the Jury, to this effect : *Gentlemen, You have heard a great deal on both sides, and Mr. Attorney says the fact is confessed by the Defendant, and I would have you bring it in specially, for there are some points I am not now prepared to answer ; How far Instructions may go, in having the force of a Law, especially when not published, or made known : And there is one objection made by Mr. Makemie, and that is the Oath of Supremacy of England is abolished ; & how far it will go in this matter, I confess I am not prepared to answer ; If you will take upon you to judge of Law, you may, or bring in the fact specially : This is the first Instance I can learn, has been of a Tryal or Prosecution of this nature in America.*

The Jury desired the Act of Assembly of *New-York* might be delivered to them ; and the Defendant desired the Jury might have the Queens Instructions also, which Mr. Attorney opposed and denied.

There is a Constable Sworn to attend the Jury, who withdraws, and in a very short time returned again.

The Jury is called, and finds the Defendant Not Guilty.

The Court begun to enquire Reasons for the Jury's Verdict, but the Chief Justice told the Jury, they might give Reasons if they would, & they might choose whether they would or not give any Reasons for their Verdict. The Foreman told the Court, the Defendant had not transgressed any Law : Another person of the Jury told the Court, they believed in their Consciences, they had done the Defendant Justice, & so the Verdict was confirmed.

Mr. *Reignere*, Attorney for the Defendant, moved, that the Defendant might be discharged ; which was by the Chief Justice referred till to morrow morning.

Saturday,

Saturday, June 7th.

Ordered that the Defendant be discharged, paying Fees, and that his Recognizance be likewise discharged.

A True Copy. *Geo. Clarke.*

The Defendant told the Court, it was an hard case, that an innocent person, and one found so upon Tryal, and by Law, and suffering so much already, and not only innocently, but for doing of good, should pay so severe Fees at last.

At length the Defendant was willing to pay all just and legal Fees to the Court, and Offices thereof, who acted indifferently in their several Offices, as to this matter, but it was unreasonable, he should pay his Prosecutors, whatsoever they were pleased to demand; this was nothing less, then hiring our Enemies to ruin us; but it being the practice, as they affirmed, no Arguments would be received.

The Defendant further told the Court, if he must pay Fees, as he was a Stranger, prayed he might not be left to the Arbitrary Demands of Officers; but that the Bill of Cost might be produced, and examined in open Court, and taxed by the Judges. But the Chief Justice declining it, as a thing he did not concern himself with: It was referred to *Robert Millward* Esqr. one of the Assistant Judges, who was to tax the Bill, after notice given to the Defendant or his Attorney, of the time & place to make their objections: But the Bill was taxed by said Judge, without any such notice given; and instead of moderating any Articles, added two new ones. And their full account was paid, and a Copy of said Account denied the Defendant, and a Receipt upon payment of Money refused, tho' paid in presence of two Witnesses.

A P O S T S C R I P T.

AS there are Preliminaries to the Tryal Published, to obviate those misrepresentations which have been industriously improved, both at *New-York*, and elsewhere, to vindicate this new and unusual Prosecution; so it is judged as necessary, to add by way of *Postscript* or *Conclusion*, for the Information of *America*, Copies of these following particulars.

1. *The Act of Assembly of New-York, for Settling a Ministry, and raising a Maintainance for them, only in some particular places of that Government.*
2. *A Copy of the Act of Parliament*

Parliament of England, for Punishing Governours of Plantations in England, for Crimes committed by them in the Plantations. 3. A Copy of such Licences as are granted by Lord Cornbury, to some Ministers. 4. An Account of the Exorbitant Charge of the Confinement and Prosecution, for Preaching two Sermons in New-York Government. 5. A Copy of Mr. Makemies Certificate from a Court of Virginia. To which I shall add some illustrating Animadversions, and so conclude this Narrative.

1. An Act passed in a General Assembly, made Sept. 12. 1693.

An Act for Settling a Ministry, and raising a Maintinance for them in the City of New-York County of Richmond, Westchester, and Queens-County.

WHEREAS Prophaness and Licentiousness have of late Overspread this Province, for want of a Settled Ministry throughout the same: To the end the same may be removed, and the Ordinances of God daily Administered. *Be it Enacted by the Governour, and Council, and Representatives Convened in General Assembly, and by the Authority of the same, That* in each of the respective Cities and Counties hereafter mentioned and expressed; there shall be called, inducted and established, a good sufficient Protestant Minister, to officiate and have care of Souls, within one year next after the Publication hereof: *That is to say,* in the City of New-York one, in the County of Richmond one, in the County of Westchester two, in Queens-County two, one at Jamaica, and the adjacent Towns & Farms: The other to have the care of Hempstead, and the next adjacent Towns and Farms.

And for their respective Encouragement; *Be it further Enacted by the Authority aforesaid,* That there shall be annually, and once every year, Collected and Paid for the Maintinance of each of their respective Ministers, the respective Sums hereafter mentioned: *That is to say,* for the City and County of New-York, One hundred Pounds; for the two Precincts of Westchester, one hundred Pounds, to each fifty, to be paid in Country Produce at Mony Price; for the County of Richmond, Forty Pounds in Country Produce at Mony Price; And for the two Precincts of Queens-County, one hundred and twenty Pounds, to each Sixty in Country Produce at Mony Price. And for the more orderly raising the respective Maintainances
for

for the Ministers aforesaid; *Be it further Enacted by the Authority aforesaid*, That the respective Justices of every City and County aforesaid, or any two of them, shall every year issue out their Warrants to the Constable, to Summon the Freeholders of every City, County and Precinct aforesaid together on the second *Tuesday in January*, for the chusing of ten Vestry Men, and two Church-Wardens; and the said Justices and Vestry Men, or major part of them are hereby impowred within ten days after the said day, or any day after as to them shall seem convenient, to lay a reasonable Tax on the said respective Cities, Counties, Parish, or Precinct, for the Maintenance of the Minister and Poor of the respective places; and if they shall neglect to issue their Warrants, so as the Election be not made that day, they shall respectively forfeit *Five Pounds*, currant Money of this Province; and in case the said Freeholders duly Summoned as aforesaid, shall not appear, or appearing, do not chuse the said ten Vestry Men and two Church-Wardens, that then in their default the said Justices shall within ten days after the second *Tuesday*, or in any day after as shall seem to them convenient, lay the said reasonable Tax on the said respective Places, for the respective Maintinances aforesaid; and if the said Justices and Vestry Men shall neglect their duty herein, they shall respectively forfeit *Five Pounds*, Currant Money aforesaid.

And be it further Enacted by the Authority aforesaid, That such of the Justices and Vestry Men that shall not be present at the time appointed to make the said Tax, and thereof be Convicted by a Certificate under the hands of such as do appear, and have no sufficient excuse for the same, shall respectively forfeit *Five Pounds* currant Money aforesaid; and a Roll of the Tax so made, shall be delivered unto the hands of the respective Constables of the said Cities, Counties, Parishes, Precinct, with a Warrant Signed by any two Justices of the Peace, empowering him or them to Levy the said Tax, and upon refusal, to distrain and sell by publick Outcry, and pay the same into the hands of the Church-Wardens, retaining to himself *Twelve pence per Pound* for Levying thereof; and if any person shall refuse to pay that he is so assessed, and the said Constable do strain for the same, all his Charges shall be paid him, with such further allowance for his pains, as the said Justices, or any of them shall judge reasonable. Or if the said Justice or Justices shall neglect to issue the said Warrant, he or they respectively shall forfeit *Five Pounds*, Currant Money aforesaid.

And if the said Constable, or any of them fail of their duty
herein,

herein, they shall respectively forfeit *Five Pound*, Currant Money aforesaid, and the Church-Wardens so Chosen, shall undertake the said Office, and receive and keep a good account of the Money or Goods levied by virtue of this Act; and the same issue by Order from the said Justices and Vestry Men of the respective Cities, Counties, Precincts and Parishes aforesaid, for the purposes and intents aforesaid, and not otherwise. And the Church-Wardens shall, as often as thereunto required, yield an Account unto the Justices and Vestry Men, of all their Receipts & Disbursements; and in case the Church-Wardens, or any of them, shall neglect their Duty herein, they shall respectively forfeit *Five Pounds*, Currant Money aforesaid, for every refusal.

And be it further Enacted by the Authority aforesaid, That the said Church Wardens in their respective Precincts aforesaid, shall by Warrant as aforesaid, pay unto the respective Ministers, the Maintenance aforesaid, by four equal & Quarterly Payments, under the Penalty of *Five Pound*, Currant Money aforesaid, for each neglect, refusal or default; the one half of all such forfeitures shall be disposed of to the use of the Poor in each respective Precinct, where the same doth arise; and the other half to him or them that shall prosecute the same.

Always Provided, and be it further Enacted by the Authority aforesaid, That all and every the respective Ministers that shall be Settled in the respective Cities, Counties and Precincts above-said, shall be Called to Officiate in their respective Precincts aforesaid, by the respective Vestry Men & Church-Wardens aforesaid: And always Provided, that all former Agreements made with Ministers throughout this Province, shall continue and remain in their full force and virtue: Any thing contained herein to the contrary hereof in any wise notwithstanding.

An Act to Punish Governours of Plantations in this Kingdom, for Crimes by them committed in the Plantations.

WHereas a due Punishment is not provided for several Crimes and Offences committed out of this His Majesty's Realm of England; whereof divers Governours, Lieutenant-Governours, Deputy-Governours or Commanders in Chief of Plantations

Plantations and Colonies within his Majesty's Dominions beyond the Seas, Have taken Advantage, and have not been deterred from Oppressing His Majesty's Subjects within their respective Governments and Command, nor from committing several other great Crimes and Offences; not Deeming themselves Punishable for the same here, nor accountable for such their Crimes and Offences, to any Persons within their respective Governments and Commands. For Remedy whereof.

Be it Enacted by the Kings Most Excellent Majesty, That if any Governour, Lieutenant-Governour, Deputy-Governours or Commanders, shall after the first day of August, One Thousand Seven Hundred, be guilty of Oppressing any His Majesty's Subjects beyond the Seas, within their respective Governments or Commands; or shall be guilty of any other Crime or Offence, contrary to the Laws of this Realm, or in force within their respective Governments or Commands; such Oppressions, Crimes and Offence shall be Enquired of, Heard and Determined in His Majesties Court of Kings Bench here in England; or before such Commissioners, and in such County of this Realm, as shall be assigned by his Majesty's Commission, and by good and lawful men of the same County; and that such Punishment shall be inflicted on such Offender as are usually inflicted for Offences of like Nature committed here in England.

A Copy of a Ministers Licence granted by Lord Cornbury.

By His Excellency *Edward Viscount Cornbury*, Captain General, &c.

To

Greeting.

I Do hereby Licence and Tolerate you, to be Minister of the Congregation at _____ in _____ County, in the Province of New-York: And to have and exercise the free Liberty and Use of your Religion, pursuant to Her Majesty's Pleasure, therein signified to me, in Her Royal Instructions; for and during so long time, as to me shall seem meet. And all Ministers and others, are hereby required to take notice hereof. Given under my Hand and Seal, at Fort-Anne, in New-York, this _____ day of _____ in the Year of Her Majesties Reign. Annoq; Dom.

Cornbury.

A

Makemies Tryal.

A Copy of a Certificate from the Court of *Accomack* County in *Virginia*, read by Lord *Cornbury*, before Commitment of *Francis Makemie*, for Preaching a Sermon at *York*.

Accomack-County ss.

THese may Certifie to all, to whom these Presents may concern, that Mr. Francis Makemie, a Dissenter and Preacher, in the aforesaid County of Accomack, hath at a Court held in the aforesaid County, October the 5th. 1699. performed and answered, by taking the Oaths, &c. Enjoined in a certain Act of Parliament, made the 24th day of May, Anno Dom. 1689. In the First Year of the Reign of King William and Queen Mary, Entituled, An Act for Exempting Their Majesty's Protestant Subjects, Dissenting from the Church of England, from the penalties of sundry Laws. And by his application to the Court by Petition obtained Order in October Court last, that his own House at Accomack-Town, and his Dwelling-House at Pocamock, should be Registred and Recorded to be the first places of his constant and ordinary Preaching: Which is Attested this 10th day of October, Anno Dom. 1699.

Per me John Washbourn, Cler. Car. Com. Accomack.

An account of the Charges of the Imprisonment of Francis Makemie, and John Hampton; and Prosecution of the former, for Preaching a Sermon at New-York City.

Item.	l.	s.	d.
T O Tho. Cardale, Sheriff of Queens County, on Long-Island, for apprehending and bringing us before Ld. Cornbury, at Fort-Anne.	04	01	00
To Charges at Jamaica, whether we were carried out of the way.	00	12	00
To Expences at White-Hall Tavern, while attending Lord Cornbury's leisure, besides what sundry Friends spent.	00	02	03
			To

To <i>Ebenazar Wilson</i> High Sheriff for Com- mitment to his House.	}	04	01	00
To Extraordinary Expences, during the time of our Imprisonment.		06	00	00
To Mr. <i>Ja. Reignere</i> for a retaining Fee.		01	13	09
To a Fee at another time.		03	06	00
To <i>Ebe. Wilson</i> , Sheriff of <i>York</i> for Accom- modation.	}	13	05	06
To Ditto for Return, and <i>Habeas Corpus</i> .		04	01	00
To the Chief Justice when we gave Recog- nizance.	}	01	16	00
To Ditto after the first Term.		00	18	00
To Mr. <i>William Nichol</i> for pleading.		02	12	00
To Ditto still due, but now ordered him.		01	10	00
To my Charges in returning with my man from <i>Virginia</i> both by Land & Water, to at- tend the Tryal at <i>New-York</i> .	}	12	06	06
To the Sheriff for a Copy of the Pannil.		00	05	06
To Mr. Attorney for the Queen tho' Cleared		12	12	06
To Mr. Secretary for Fees.		05	12	06
To the High-Sheriff for Fees after Tryal.		01	10	00
To the Judge.		01	00	00
To Judge <i>Willward</i> for taxing the Bill of Cost I think	}	00	12	00
To the Cryer and Under-Sheriff.		00	10	00
To Mr. <i>Reignere</i> for his pains in Writing and Pleading.	}	05	00	00
Sum		81	04	09

IN this Postscript, there is first, The only Establishing Act of *New-York* which the Clergy of the Church of *England* has laid hold upon, & thereby would deceive the World, in imposing upon, not only the *American*, but *European* World, that they are Established in *New-York* Government, as in *England*; but also influence that Noble Corporation or Society for Propogating the Gospel, or the Patrons of most of them, to break the Fifth Commandment, in *Stubbs* his Scheme: And tho' the foregoing Tryal has opened the eyes, and undeceived most, if not all at *New-York*, in this matter; for which they may thank a Prison. So this is to enlighten, not only those abroad in the World, but also influence and direct the Assemblys of *New-York* for the future; in not giving a handle to any, to pervert their Laws, contrary to the intention of the Legislators, or confirming

firming by subsequent Acts, in their unjust possessions; all which they may perceive from the following particulars. 1. This Law is not general for the whole Government, but for four Counties of a Colony, where there are nine Counties; so that the largest share is yet without the benefits of this Act. 2. It was made upon the motion and application of sundry Dissenters, on *Long-Island*, yet alive, who expected another benefit by it, then they have been since treated with. 3. It was made by an Assembly generally Dissenters, and are so to this day; and let such as are alive declare their design in this Law. 4. There is not any mention of so much as the name of the Church of *England*, or the mode or manner of the Church of *England* Worship, Government or Ceremonies in all the Law, without which, I cannot imagine they can have any Establishment. 5. Every sufficient Protestant Minister, duly called according to directions of said Law, has a right hereunto, and none else; and that Dissenters for whom this Law was originally designed, are deemed and called Ministers, and men in Holy Orders, is plain from the express words of the Act of Toleration. 6. None have a right unto, or should have any benefit by this Act, but he that is called and chosen by twelve men, chosen by the free Votes of the people of the County which Mr. *Urghart* of *Jamaica*, never had by any Vote of the majority; therefore has as great a right to the Salary there, as he has to the Meeting-House, with the House & Land he lives upon, of which the Proprietors have been Ousted with violence, without all legal Process or Ejectment; and being of 1500 *l.* value. It is matter of satisfaction this practice is singular, and not yet made a President of, tho' *New-Town* is threatned by the same Parson. 7. It is observable, at the time this Law was made, there was not a Church of *England* Clergyman in all that Country, and for some time after. 8. As no person had a right by this Law, but such legally called, and chosen; so consequently it was no crime for the Vestry to refuse levying or paying money to such as had no right. 9. By *English* Law, and Practice, no Vestry men were to be fined as culpable, until legally convicted of the crime, or matter of fact. 10. By the last clause of this Law, all former Agreements made between Ministers and People, were confirmed and ratified, and all such were then, and are to this day, *Dutch*, *French*, and *British* Dissenters. So much concerning *New-York* Act of Assembly.

As to the *English* Act of Parliament, I shall say nothing, but leave that to the *Queens-Bench*, and the Learned Judges there,

there, when the crimeless Mittinus, and till further order comes to be tryed by them.

The next Copy is a *New-York* Licence, not so common and and general to Dissenters, as Mr. Attorney asserted at the Tryal ; for if they were all called in, they would make but a small number, and any may have them for half the money they cost ; and with some not so easily swallowed down, as Conformity, for which we dissent : And for these Reasons. 1. If we are not Ministers before, this Licence can never make us so. 2. No such Instructions from the Queen was produced at the Tryal, as laid Dissenters under any obligations of taking Licences. 3. By this Licence they are only tolerated to exercise their Religion in one Congregation, and allows not a liberty to Preach to any People in the whole Government, who shall desire it, which no Minister in his right wit for the future, will submit to. 4. It is a most precarious liberty, which is granted, not, *Quamdiu bene se gesserit*, but during pleasure ; which is inconsistent with that Commission and Authority, which Ministers of the Gospel, called of God, derive from the Lord Jesus Christ, the Head and King of his Militant Churches : Therefore it is from a principle of Conscience, and not from any contempt of Government or disrespect to the persons of any in Authority, that they cannot, they dare not submit to such a Licence, so inconsistent with the toleration, and that liberty of Conscience allowed in *Britain*, and practised in all the Queens Dominions, besides *New-York*, and commanded to be allowed by the Queens Instructions.

The next thing to be taken notice of in this Postscript, is a Copy of Mr. *Makemies* Certificate from a Court of Record in the Dominion of *Virginia*, which was produced to, and read by *Ld. Cornbury*, before Confinement, and shown to the Grand Jury, before the Presentment was found : And tho' Mr. Attorney told the said Jury, while four of the Hearers were examining upon Oath concerning the Sermon, this Certificate was writ under a Hedge, which no doubt influenced them to have no regard thereunto ; Yet if the Act of Toleration, and consequently this Certificate had come in play at the Tryal, he was armed with an Exemplification from the Government, signed by the Præsident, and the Seal of the Colony annex, to prove the truth and validity of this Certificate, and vindicate it from Forgery.

The last thing is an account of the Expences, of not only a person who is innocent, but for doing good, as was determined by the Tryal ; and in complying with the most solemn obligations

tions of duty, both to God, and the Souls of men. To which, besides loss of time, and absence from his Family and Concerns, he might have justly charged *Twelve Pounds* more Money, by being necessitated to make his Escape, both by Land and Water to *New-England*, from Officers with new Precepts, whereby a whole Sabbath was prophaned, in seeking to apprehend him ; for which some must be accountable.

But it is plain and undeniable, that the Prosecution of the most innocent person in the world at *New-York* is more expensive, then if Mr. *Makemie* had been guilty of all the Pænal Laws mustered up, in the Indictment against one Sermon, if prosecuted in *England*, even while Pænal Laws were in force, and Executed there.

And a fair and legal decision, cannot put an end to a Controversy, where the same fact is made criminal, and a new Process violently designed, and vigorously aimed at, by such, as nothing but the interposition of the Authority of *England* will put a stop to.

And what legal Authority Mr. Attorney, and a perpetual Sheriff have for their demanded Fees, I leave to the Regulated Table of Fees of *New-York* to determine ; not to be paralleled by any Colony in Her Majesty's Dominions.

In regard that all Opportunities have been denied to the abovesaid Mr. Makemie for his own Vindication, 'twas thought proper here to Subjoin a Copy of his Letter to the Lord Cornbury, of which no regard was had, nor answer given.

Boston, July 28th. 1707.

May it please Your Lordship,

I Most humbly beg leave to Represent to Your Excellency my just astonishment at the Information received from sundry hands since my arrival in these Colonies, and after so long and so expensive a Confinement, so deliberate and fair a Tryal, before Judges of Your Lordships appointment, and by a Jury Chosen by your own Sheriff, on purpose to try that matter : I have been legally cleared, and found guilty of no Crime
for

for Preaching a Sermon at *New-York*, though my Innocence protected me not from unspeakable and intollerable Expence.

I am informed, *may it please your Excellency*, there are Orders and Directions given to sundry Officers in the *Jerseys*, for apprehending me, and a design of giving me fresh trouble at *New-York*.

If I were assured of the true cause of Your Lordships repeated Resentments against me, I doubt not but my Innocence, would not only effectually justify me, but remove those impressions imposed on Your Lordship by some persons about you.

And as to my Preaching, being found at the Tryal, against no Law, nor any ways inconsistent with Her Majesty's Instructions produced there; and considering the solemn Obligations I am under, both to God, and the Souls of men, to embrace all opportunities for exercising those Ministerial Gifts vouchsafed from Heaven; to whom I do appeal, I have no other end, besides the Glory of God, and the Eternal Good of Precious Souls: I must assure my self Your Lordship insists not on this now as a Crime, especially in *New-York* Government, where all Protestants are upon an equal level of Liberty, and no legal Establishment for any particular Perswasion.

I hear I am Charged with the *Jersey* Paper, Call'd, *Forget and Forgive*; tho' the proving a Negative in my just Vindication be an hard Task, and not an usual undertaking; yet doubt not but the thing it self, the matter it contains being foreign to me, and no way concerned me: the time of its publication, being so soon spread abroad after my arrival; I am well assured, none dare legally accuse me, while the Authors smile at Your Lordships mistake and imposition, whose Informers deserve to be stigmatized with the severest marks of Your Lordships Displeasure; and the Authors will find a time to confront my sworn Accusers of Perjury; and besides that, I never saw it till about the last of *February*: We have suffered greatly in our Reputations, and particularly by being branded with the Character of *Jesuits*; tho' my universal known Reputation in *Europe* and *America*, makes me easy under such invidious imputations: I have been represented to Your Lordship as being factious in the Government, both of *Virginia* and *Maryland*: I have peaceably lived in *Virginia*, and I brought from *Maryland* a Certificate of my past Reputation, signed by some of the best Quality on the most Contiguous County, ready to be produced at the Tryal, if there had been occasion for it: A Copy of which I presume to Inclose for Your Lordships perusal and satisfaction.

*Makemies Tryal.*

I beg leave to represent to Your Lordship my just concern at the sundry Precepts for apprehending me, both in *York* and *Jerseys*, as one of the greatest Criminals; whereby I am prevented in performing my own Ministerial Duties to many in Your Lordships Government of my own Perswasion, who desire it. I shall patiently expect Your Lordships *Commands* and *Directions*, in giving me an opportunity for Vindicating of my self in what is charged against me, and being always ready to comply with any Qualification enjoined and required by Law.

I beg leave of Your Lordship to Subscribe myself Your Excellency's Most Humble and most Obedient Servant.

Francis Makemie.

FINIS.

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